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Charles S. Desmond, *Legal Problems Involved in Censoring the Media of Mass Communications*, 40 Marq. L. Rev. 38 (1956).
Available at: <http://scholarship.law.marquette.edu/mulr/vol40/iss1/5>

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LEGAL PROBLEMS INVOLVED IN CENSORING THE MEDIA OF MASS COMMUNICATION

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My thesis, so far as I have one, is that there is nothing in American law, constitutional, statutory or conventional, to prevent pre-censorship for obscenity, and that such pre-censorship, applied reasonably and justly and without impingement on the public right to be informed and without destruction of real literary values is not offensive to the historic American tradition of freedom of publication.

It is remarkable and paradoxical that the United States Supreme Court while deciding during its long history perhaps two hundred cases directly or indirectly involving freedom of speech, press and religion has never announced a comprehensive definition of "freedom of the press" or indeed, of the other First Amendment freedoms of speech and religion. When our Bill of Rights was adopted, there were in the newly-organized United States of America perhaps a hundred publications that could be called newspapers. There was some pamphleteering and no book publishing business worthy of the name. Our country today boasts more than 10,000 newspapers and some 5,000 periodicals of other sorts, and publishes annually some 12,000 new book titles. Yet, not only do we not find in our statutory or decisional law any authoritative statement as to what any of those publications may be prevented from including in their content—we do not even have any final declaration by our highest Federal court as to whether prevention or prohibition of any kind, degree or extent is authorized by or despite the First Amendment to the United States Constitution. Putting it another way and stating baldly the number one question in this area of the law—does the First Amendment void all attempts at censorship by government of anything written, printed or pictured? The failure of our judicial processes, over a period of now one hundred seventy years, to produce such final and definitive answers, results, of course, from two distinctive features of our American system of judging. The first of these causes is the refusal by our courts (at least our Federal Courts) to give advisory rulings, and their corollary insistence on having a real adversary cause before them before furnishing answers to any questions of law. The second characteristic of the American judicial process which has resulted in this long failure to answer so important a legal question is judicial reluctance to decide

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any more than is directly and necessarily involved in the particular litigation before the court. Since I speak here individually as a lawyer and, I hope, a student of this general subject, but not authoritatively as a judge, I am not ready with any complete answer, either. But I will try to describe and define the question, show how it arose, what progress has been made toward an answer, and, just incidentally and accidentally, hint at solutions.

Censorship, since it necessarily restricts freedom, has always been and will continue to be unpopular with those who, from principle or perversity or for profit, insist on unbridled freedom. The censor, prohibiting what is to him odious, brings onto himself the odium of the author or publisher of the censored material. Those two public officials of ancient Rome, called "censors" who first were empowered to take the census, then broadened their scope to include supervision of the morals of others, were not popular in their day. But those two Roman censors were performing a function which governments have assigned to themselves from early Roman days to our day.

A brief and sketchy history of censorship will serve our purposes at this point. In classical Greece and Rome there was control by law at least of seditious and libelous utterances. The Christian Church from earliest times banned certain writings. In France from the sixteenth century on, printing was subject to licensing. But it is the conflict which raged in England over censorship and licensing for centuries that we are most interested in, for our purpose. The printing press commenced its work in England in the fifteenth century but there was no periodical press in anything like modern form till the early seventeenth century. For about a century the British Government tried, never with real success, to enforce press licensing laws. Up to the time of the American Revolution most of the English prosecutions were for libel or sedition, but some were for obscenity, as we shall see. In Britain's American colonies there were, when our Revolution broke out, about one hundred newspapers of one kind or another, as I have said—and suppression of such publications by the royal colonial governors was not unknown. Then came the successful American Revolution, the ratification of our Federal Constitution, and then the adoption of the Bill of Rights, including the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Let us now skip to the present-day problem, and return later to history.

In our country and our time, few if any attempts are made to censor mass communication media except as to alleged obscenity in

movies, magazines, comic books and pocket-size books. Our discussion, therefore, will be, principally, as to the legal problems surrounding prior restraint of publication of printed and pictorial material alleged to be obscene. Peripherally, we will find it necessary to discuss the closely connected but not identical question of criminal punishment for obscenity. Also, in such a paper as this, it will be impossible to avoid policy considerations and it is idle to pretend that one's conclusions are not influenced by fundamental beliefs and the moral code to which one subscribes.

Our immediate topic as to the law of censorship of allegedly obscene publications, divides itself into three sub-inquiries:

first, as to whether any and every prior restraint of publication or distribution is unconstitutional under the First and Fourteenth Amendments to the Federal Constitution?

second, if there be a negative answer to our first query, what, in legal theory, is obscenity and who is to define it and apply the definition?

third, assuming the constitutionality of censorship, are different standards to be applied to the press, properly so-called, and to other media?

Of course, if our first question demands an unqualified affirmative answer, our discussion, if not our troubles, is at an end. And we must admit that there are plenty of quotations available from impressive sources (not, however, including any official majority Supreme Court opinions as I read them) to the effect that all prior restraint is unconstitutional under the free speech and free press guarantees of our Federal Constitution. There is no doubt at all that the First Amendment had for its principal purpose the prevention of previous restraints in the light of abuses of the past, such as the suppression of newspapers by the royal colonial governors.¹ In *Patterson v. Colorado*,² Justice Holmes wrote that the main purpose of the First Amendment was to "prevent all such previous restraints upon publications as had been practiced by other governments." It is plain that he referred to earlier silencing of political opinions. The *Grosjean* case³ says no prior restraints are constitutional but this statement must be read in the context of the case itself. The question is: what did the First Amendment mean to its authors? Our Revolutionary forbears had not forgotten the monopoly on printing given by Henry VII to his favorite, nor the practice of the Tudor and Stuart kings of controlling the printed word through licensing, nor Milton's ringing attack on

¹ *Leach v. Carlisle*, 258 U.S. 138; *Near v. Minnesota*, 283 U.S. 697, 713, 719; *Patterson v. Colorado*, 205 U.S. 454, 462; *U.S. v. Paramount Pictures*, 334 U.S. 131, 166.

² 205 U.S. 454, 462.

³ 297 U.S. 233 (1936).

that licensing system in his *Areopagitica* (1644). Patrick Henry shouted his fears that Congress might "silence the censures of the people." As Chief Justice Hughes in 1938 noted in his opinion in *Lovell v. Griffin*,⁴ liberty of the press in the eighteenth century meant freedom from governmental licensing, that is, the right to publish without a license what formerly could be printed only with one. Benjamin Franklin, whose 250th birthday we honor this year, said that liberty of the press is "the liberty of discussing the propriety of public measures and public opinions." Let me offer a few historical facts to show that freedom to express opinion was all that the Founders had in mind.

The Delaware State Constitution, adopted in 1782 included this: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity, and any citizen may print freely on any subject, being responsible for the abuse of that liberty." The Maryland Constitution of 1776 announced that "freedom of speech and debates on proceedings in the Legislature, ought not to be impeached in any other court or jurisdiction." The Massachusetts Constitution of 1780 pointed out that "Liberty of the press is essential to freedom in the State." Still earlier, the First Continental Congress in a Declaration of Rights had described the importance of freedom of the press, besides advancing truth, science, morality and arts, as being "its diffusion of liberal sentiments in the administration of government." One of the reasons advanced for omitting a Bill of Rights from the Federal Constitution was that the states (not including New York) had already safeguarded these freedoms in their own charters and that the Federal government had nothing to do with them. An examination of those state constitutions makes it clear that it was press freedom as to governmental and political questions that was intended to be protected. When the Federal Constitutional Convention was about to recess, it passed a resolution urging Congress to propose and procure amendments to the Constitution of the United States. Among the changes the Convention asked Congress to obtain was one "that the people have a right to freedom of speech and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated." In 1895 the Supreme Court in the *Mattox* case⁵ said that the Constitution should be interpreted as securing to individuals the rights their British ancestors had fought for. Judge Cooley in his monumental treatise on Constitutional Limitations⁶ said that "the evils to be prevented were not censorship of the press merely, but any action of the

⁴ 303 U.S. 444.

⁵ 156 U.S. 237 at 243.

⁶ See 8th edition, Vol. 2, p. 886.

government by which it might prevent such free and general discussion of public matters as seems essential," etc. I have multiplied these quotations deliberately (and many more are available) to prove or at least illustrate my point that the freedom our Founding Fathers sought was freedom of discussion, particularly on public questions.

Our Founding Fathers were thus quite aware that it was political freedom that required a free press (there was actually no real or complete freedom of press in the English colonies) and that the existence of any governmental power to choke off political criticism and agitation is inconsistent with the concept of a democratic state and a free people. Long before our Revolution, Blackstone⁷ had written that "The Liberty of a free press is indeed essential to the nature of a free state . . ." Free trade and free competition in ideas were the freedoms intended to be protected by the First Amendment. Suppression of opinions was vicious, prior restraint on publication of such opinions was intolerable for free men. But, even in the earlier days when Blackstone had written his commentaries which were well known in Eighteenth Century America, a difficulty had presented itself, and a compromise solution had been attempted or suggested. Suppose that the publication which could not legally be suppressed in advance, turned out to be seditious or libelous or otherwise violative of positive law. What then to do about it? Blackstone's answer was that while "every freeman has an undoubted right to lay what sentiments he pleases before the public" he must, nonetheless, "take the consequences of his own temerity" if he publishes what is "improper, mischievous or illegal." And persistent to this day is that distinction: that while ordinarily there can be no advance restraint of publication, a publication which cannot be restrained may nonetheless incur for its author or distributor criminal punishment or civil liability in damages. Lord Mansfield wrote that: "The liberty of the press consists in printing without a license subject to the consequences of law."

Right here it would seem appropriate to stop to consider the validity of that proposition, so confidently and frequently stated by the enemies of censorship. Perhaps it has been adopted so completely and finally by our courts, at least as to newspapers, that it is too late for a retreat. But if the question still be open, and I will refer back to it again with direct reference to obscenity, it seems to me that the asserted rule goes too far or not far enough. If freedom of publication is as absolute as its defenders say it is, then subsequent punishment is an infringement of that freedom just as is prior restraint. In both cases, the effort or at least the effect is to deter or discourage offensive publications. Of course, an injunction or a refusal to license in terms prohibits as to the future while subsequent punishment deals with an

⁷ 4 BLACKSTONE 151-2.

act already done. But an injunction may be violated, too, and the person enjoined may take the risk of punishment for contempt for his violation of the injunction. Thus, neither remedy can claim absolute efficacy, each has the same general purpose and there would seem no logical basis for holding one kind of sanction valid and the other invalid. To be sure, there are some practical differences. One who is allowed to publish and distribute but is then indicted for crime has the dual (if dubious) advantage of having gotten his product before the public and then of being protected by a jury of his fellow citizens from unjust conviction. To be fair, there is, too, another valid distinction between restraint and punishment, at least as to non-obscene matter. In a given instance, the advantage to the public in seeing a particular article may outweigh the incidental small damage to an individual's reputation, and a post-publication civil libel suit might be a better all-round remedy than prevention of publication. Not so, however, as to obscene production, a public rather than a private wrong.

However, so that we may progress in our presentation, we will for the present assume the American law to be, as to publications not obscene or involving clear and present danger but otherwise unlawful, that prior restraint is unconstitutional.

Now back to our first question: is prior restraint of obscene publications unconstitutional? The Supreme Court on at least four occasions seems to have been forced to, or to have found a way to, keep the question open. In the famous 1931 case of *Near v. Minnesota*,⁸ the court suggested that "prior restraint might be legal as against obscene publications." In *Chaplinsky v. New Hampshire*,⁹ the court's opinion pointed out that there are certain classes of speech the prevention and punishment of which have never been thought to reach any constitutional question, and among those classes the opinion included the lewd and obscene. Similarly an opinion by Justice Frankfurter in *Beuharmain v. Illinois*,¹⁰ seems to say, as he did in his dissent in the *Winters* case, that obscene speech is not within the area of constitutional protection. In the *Doubleday* case,¹¹ a criminal prosecution for the publication of "Memoirs of Hecate County" the Supreme Court had a real opportunity to set all this at rest, since no other question was in the case. But the eight justices who sat divided 4-to-4 and, as is the custom in such situations, there was no announcement as to who voted which way.

In both the *Near* and the *LaRonde* litigations we had real prior restraints, that is, censorship, in one instance of a newspaper and in the other of a motion picture. If the Supreme Court did not in either

⁸ 283 U.S. 697.

⁹ 315 U.S. 568.

¹⁰ 343 U.S. 250, 266.

¹¹ 297 N.Y. 687, 335 U.S. 848 (1948).

case reach the question of constitutionality of prior restraint of obscenity, it did indicate in each that such restraints were not necessarily and per se invalid. To my mind, that must be so. Let us start with a few fundamentals. I assume the concept of obscenity, that is, that some things are indecent, lewd, offensive to decency. Tests, definitions and standards we will talk about later, but unless you agree that the word "obscene" has meaning, we have no common ground at all. Next, I will assume that a prime and proper function of government is to protect its citizens, or such of them as need protection, against pollution and harm from physical objects, against poisons and dangerous and offensive nuisances. I have never been able to understand why similar protection against the impact of filthy books should be unconstitutional. I think that protection of public morals through the established instrumentalities of government is a proper subject for the exercise of the police power.

Actually, it is easy to prove that the legitimate protection of public morals has always been a valid objective for state statutes. Examples of such statutes, upheld despite complaints of unconstitutionality, are those regulating gambling, prostitution, intoxicating liquors, marriage, divorce, polygamy, commercial frauds, Sunday observance, working hours of women and children, rec. etc. Volumes could be written about the basis and necessity for such a legislative power, but Justice Swayne in *Trist v. Child*¹² in 1874 said it all in eleven words: "The foundation of a republic is the virtue of its citizens."

That there is an organized trade in smut is obvious enough. Two illustrations will suffice. In 1954, the NEW YORK STATE LEGISLATIVE COMMITTEE TO STUDY THE PUBLICATION OF COMICS displayed a collection of widely-circulated so-called "comic books" which literally opened the eyes of those of us who do not keep in touch with that particular genre. Intended for children and adolescents, these wildly lurid picture stories regaled the reader with violence cum sex. In 1935 in New York City injunctions were obtained under a state statute, against the further sale of a sort of magazine called "Nights of Horror," the contents of which did not belie the title. These, it would seem, were intended as adult or late-adolescent fare, since separate copies were sold at from \$2 to \$4. New York, like every other state and the Federal government, has applicable criminal obscenity statutes. But prosecution under those criminal laws not only comes after the event, but criminal prosecution means that every bookseller has his separate jury trial with probable divergent results depending on the moods and mores of jurors. Meanwhile, distribution must go merrily on, I suppose. Prior restraint by injunction, on the other hand, would, if obeyed, stop the sale and a judgment in one such case would, I

¹² 88 U.S. 441, 450 (1874).

assume, be the law not of the particular sale transaction or as to the individual seller but would adjudge the obscenity of the book itself. Some kind of distinction is attempted here by some theorists in that, so they say, an injunction against further sale of magazines already on the newsstands is something different and perhaps constitutionally less bad than an injunction (as in the *Near* case) against further publication of succeeding issues. I see no difference at all.

There is little, if anything, in legal history to provide a direct answer to the question of whether the First Amendment was intended to have any relation to obscenity. There is, as we shall show, a considerable history as to obscenity laws and prosecutions in seventeenth-century England and eighteenth, nineteenth and twentieth century United States. But we simply do not find a definite answer as to whether the authors and advocates of the Amendment (submitted as the Third but adopted as the First) intended to guarantee freedom for anything more than expression of ideas and opinions as distinguished from fiction, fantasy or pornography. At least from 1727¹³ the publication of an obscene book, picture or article was a common law crime in England. In making that categorical statement I am not unaware that some few learned writers state the contrary. They attempt to prove from an examination of the English eighteenth century obscenity indictments, trials and judgments, or the few they find of record, that obscenity as such was not punishable, but only such obscenity as was sacrilegious, blasphemous or seditious or which caused a breach of the peace. But, I think, these learned scholars are reasoning from specific cases to too-general conclusions. What these cases (like the prosecutions of Read, Curl, Sedley and John Wilkes) mean to me is that standards of public morality were low and that obscenity, while a common law crime, did not actually bring an offender to book unless his speech or antics discredited government or the established church. Similarly, I think certain statements appearing in Lord Auckland's *PRINCIPLES OF PENIAL LAW* and Hawkin's *PLEAS TO THE CROWN* (both late eighteenth century) mean not that obscenity was not a crime but that it took a lot to make out obscenity in that day.

I have examined with care such reports as are available (*LLOYD'S CONGRESSIONAL REGISTER* and *GALES and SEATONS' HISTORY OF DEBATES IN CONGRESS*) of the proceedings in Congress which initiated the submission to the States of the Bill of Rights in the form of Amendments to the Federal Constitution. Nowhere do I find in the meagre references to what is now the First Amendment any suggestion that Congress meant to protect anything more than free expression by the people and the press on subjects which interested them. I think

¹³ Curl's case, 2 Strange 789.

the whole tenor of those discussions runs against the idea that freedom of expression in fiction or pictorial art was in the minds of the Congressmen or the people whom the Congressmen represented and who were demanding a more specific and complete statement in their Great Charter of what they considered to be fundamental rights beyond the reach or control of government. The most definite indication of intent I find is in the form of the freedom of speech and press provision as first proposed by Madison, its leading spokesman. It then read as follows:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."

The ideas there put forward were never changed, but only form and style. Those ideas are, I submit, unrelated to obscene books or pictures. I find further support in the fact that this draft of the "free speech and free press" amendment was, in Madison's original proposal, immediately followed by and coupled with this proposed amendment:

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions or remonstrances, for redress of their grievances."

Thus, we find Madison, spokesman for those who demanded a forthright statement in the Constitution itself of the people's rights, proposing as one amendment in several parts a prohibition against abridgement of religious belief, a prohibition against the establishment of a national religion, a prohibition against infringement of the right of conscience, a prohibition against restraint of free speech or of the press, or of peaceful assembly and petition. It is a distortion of that simple idea, I suggest, to say that the Constitution as thus amended forbade prior restraint of indecent writings. That obscenity was a common law crime in America when our Constitution was adopted cannot reasonably be denied.¹⁴ The American colonists fought their Revolutionary war to secure for themselves the rights of Englishmen. Since there was in common-law England no "freedom of the press" for obscenity and since the guarantees of our constitution are to be interpreted in the sense they had acquired at common-law, since the colonists were insisting on the rights of English freemen, is it over-simplification to say that our constitutional guarantees of "freedom of the press" had simply nothing whatever to do with indecent writings? It has never been claimed, so far as I know, that the constitution abolished this common law criminal liability for obscenity. Indeed, in *Robertson v. Baldwin*,¹⁵

¹⁴ *Winters case*, 333 U.S. 507.

¹⁵ 165 U.S. 275, 281 (1897).

decided in 1897, the Supreme Court came close to saying this when it spoke as follows:

"The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." Thus, "the freedom of speech and of the press does not permit the publication of libels, blasphemous or other indecent articles, or other publications injurious to morals or private reputation."

Censorship laws and their advocates may be railed at and ridiculed, their oppressive effects on creative literature may be stressed, conventional tests of obscenity may be denounced—it is still a non-sequitur that obscenity laws, preventive or punitive, are inconsistent with the Federal Constitution.

Actually, the United States government has from its first days exercised an elaborate censorship of material submitted to it for carriage through the mails, and the Supreme Court has through the years recognized the right of Congress to exclude from the mail matters injurious to the public. In *Ex parte Jackson*,¹⁶ decided in 1877, the Supreme Court held constitutional a statute which declared information concerning lotteries to be non-mailable, on the theory that Congress has the right to regulate the postal system, has the right to designate what shall be carried in the mail and conversely the right to designate what shall be excluded from the mails. However, the court recognized restrictions on the regulating power of Congress:—freedom from unreasonable search and seizure of sealed mail and freedom of the press (p. 733). Discussing that statute, the court said:

"All that Congress meant by this act was that the mail should not be used to transport such corrupting publications and articles, and that anyone who attempted to use it for that purpose should be punished" (p. 736).

The Court referred to the forerunner of present Section 1461, Title 18, U.S.C.A. which declared "that no obscene, lewd, or lascivious book, . . . shall be carried in the mail" and said:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for

¹⁶ 96 U.S. 727 (1877).

the distribution of matter deemed injurious to the public morals" (p. 736).

The right of Congress to exclude matter from the mail has been reasserted by the Supreme Court many times since the *Jackson* case. Some of the cases are: *In re Rapier*,¹⁷ where a conviction for placing in the mail newspapers containing advertisements of the Louisiana State lottery was upheld; *American School of Magnetic Healing v. McAnulty*,¹⁸ where an injunction was sought against a Postmaster who was returning mail to senders stamped "Fraud"; *Public Clearing House v. Coyne*,¹⁹ where in a "chain letter" scheme the Postmaster General denied the use of the mail to the group and seized all of its letters; *Milwaukee Publishing Co. v. Burleson*,²⁰ where the Postmaster General, after a hearing, revoked the second-class mail privilege of a newspaper for violating provisions of the Espionage Law.

In *Hannegan v. Esquire, Inc.*,²¹ decided in 1946, the Supreme Court held that the Postmaster General, upon a finding that *Esquire Magazine*, while not obscene, did not meet the requirements of second-class mail because it was not a publication which was making a "special contribution to the public welfare" within the meaning of the CLASSIFICATION ACT OF 1879, could not revoke *Esquire's* second-class mail permit. The court so held on the ground that Congress did not intend that an applicant for a second-class postal rate "must convince the Postmaster General that his publication positively contributes to the public good or public welfare" (p. 157), and on the further ground that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system" (p. 158). Justice Douglas writing for the court, said: "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates" (p. 158).

The censorship question in postal regulation is pointed up by the following paragraph in the *Esquire* opinion:

"We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years. And the court held in *Ex parte Jackson*, 96 U.S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege

¹⁷ 143 U.S. 110.

¹⁸ 187 U.S. 94.

¹⁹ 194 U.S. 497.

²⁰ 255 U.S. 407.

²¹ 327 U.S. 146.

which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 421-423, 430-432, 437-438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country" (p. 155-156) (see note 18, p. 156).

*Swearingen v. U.S.*²² contains a definition of "obscene," "lewd," and "lascivious." That case involved a prosecution on a charge of placing in the mail a newspaper containing an "obscene, lewd and lascivious" article. The court said:

"The words 'obscene,' 'lewd' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecution for obscene libel."

The court found the newspaper article vulgar.

"But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

In *United States v. Limehouse*,²³ a prosecution under Section 211 of CRIMINAL CODE containing words "obscene, lewd or lascivious and every filthy book," etc., (same adjectives used in Title 18, section 1461, U.S.C.), it was held that amendment so as to include "filthy" brought in a new category so that the rule of the *Swearingen* case as to "obscene, lewd and lascivious" did not apply and letters plainly relating to sexual matters were "filthy."

The UNITED STATES CUSTOMS LAWS as well as the POST OFFICE LAW authorizes the banning of obscene books and there are many Federal cases construing and applying these Custom laws as to obscenity. Since what we have said above as to the Post Office statutes establish that the words "obscene" and "obscenity" have been similarly construed and applied by the Supreme Court, it is unnecessary here to analyze court treatment of those same words in the CUSTOM LAWS.

While it is still true that the Supreme Court has never given a flat "yes" or "no" to the question of whether prior restraint is ever constitutional, there is in the famous "Miracle case"²⁴ the strongest kind of intimation that censorship of films as obscene is constitutionally licit. Our court (N.Y. Court of Appeals) as a group saw *The Miracle* exhibited in Albany and surely it was a dull, drab picture to stir up such

²² 161 U.S. 446, 451 (1895).

²³ 285 U.S. 424 (1932).

²⁴ *Burstyn v. Wilson*, 343 U.S. 495 (1952).

a fuss about. Filmed in Italy, it was the story of a simple-minded peasant girl who was seduced or raped by a stranger whom the girl in her clouded mind thought to be St. Joseph. When the girl is seen to be pregnant the villagers deride and mock her because she seems to think that she has conceived by some miracle. The New York movie censorship law (SECTION 122 OF THE EDUCATION LAW) directs the motion picture division to issue a license unless the film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious or is of such a character that its exhibition would tend to corrupt morals or incite to crime. When *The Miracle* opened in New York City there was a great hue and cry, and the License Division which had previously licensed the film withdrew the license after further hearings, on the ground that the picture was sacrilegious. The New York courts upheld this ban. The United States Supreme Court, however, thought otherwise. First, the Court made the holding, intimated but not announced in previous decisions, that the First Amendment's "freedom of the press" included motion pictures. Then the court turned its attention to the legality of New York's refusal to license *The Miracle*. The majority of the court was careful to point out that the Constitution does not require "absolute freedom to exhibit every motion picture of every kind at all times and at all places." Nonetheless, the refusal to license *The Miracle* was held invalid solely because the denial of license was on the ground that the picture was "sacrilegious." The outstanding importance for us of *The Miracle* decision in the Supreme Court is the court's caveat that it was not deciding "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." In other words, the Supreme Court came very close to saying "obscene" is a proper standard for censorship of motion pictures. It is significant that all nine of the justices concurred in this opinion, although there were two concurring opinions. However, two years later when the censorship of two more banned films was before the Supreme Court, Justices Douglas and Black stated their separate view that any and all censorship of motion pictures is absolutely unconstitutional. Thus it would appear that of the seven justices now on the court who took part in the 1952 and the 1954²⁵ decisions, five are committed to the idea that censorship for obscenity is not per se unconstitutional. While the two dissenting judges in those cases wrote an opinion in which they stated their own belief that all censorship is unconstitutional, the majority contented itself with the simple statement that the judgements below were reversed on the authority of the *Burstyn* case. The picture refused license in Ohio was "*M*" and Ohio had rejected it with a statement that it was "harmful" and would increase crime,

²⁵ *Superior Films v. Ohio*, and *Commercial Pictures v. New York*, 346 U.S. 587 (1954).

etc. The New York picture which the Supreme Court held could not be refused a license was *La Ronde*. *La Ronde* was a light, frivolous French product portraying several episodes of illicit amorous adventure. It had been barred by the New York censors not as being "obscene" but because, so said the New York motion picture division, it was "immoral" and would "tend to corrupt morals." I suppose the cryptic statement in 1954 of the Supreme Court of its reasons for upsetting the New York and Ohio determinations meant that in each instance the standard applied was too vague. Perhaps New York's mistake was that it did not term this picture "obscene" since the novel from which it was adapted had itself been the subject of a criminal prosecution for obscenity resulting in a conviction which was upheld by the New York court in *People v. Pesky*.²⁶ But the New York censors had used instead the statutory term "immoral." The New York censors may have noticed that the word "immoral" in some form was in several other state censorship statutes, and that the very word "immoral" in the Ohio censorship law had apparently been treated as sufficiently definite for such purposes in *Mutual Film Corp. v. Ohio*.²⁷ Perhaps the New York censors had read the many decisions of many courts recognizing the existence in our society of a definite moral code. They might even have been impressed by the statement of the Supreme Court itself in *Zorach*,²⁸ that "We are a religious people whose institutions presuppose a Supreme Being." However, the Supreme Court seems to have told us the words "sacrilegious," "immoral" and the Ohio word "harmful" are too vague and indefinite to express constitutional standard. In fairness, I must admit my own court and I myself, contributed to the result in the Supreme Court in the *La Ronde* case by differing among ourselves (on the New York Court of Appeals) as to whether the word "immoral" in the New York statute referred to sexual morality only or to a general code of morals. We must await with patience the issuance of a definitive ruling by the Supreme Court as to whether there may be censorship of movies as obscene, but I do not see how the opponents of censorship find any real comfort in these latest decisions of the highest court.

There is still another United States Supreme Court decision as to motion picture censorship which must be noticed briefly and while this one is the latest of all having been decided on October 24, 1955, it certainly does not, to my mind at least, settle anything or clear up any confusion heretofore existing. The case was *Holmby Productions v. Vaughn*,²⁹ where the United States Supreme Court unanimously reversed a decision of the Supreme Court of Kansas.³⁰ The picture in-

²⁶ 254 N.Y. 373.

²⁷ 236 U.S. (1915).

²⁸ 343 U.S. 313.

²⁹ 350 U.S. 870.

³⁰ 282 P.2d 412.

volved was *The Moon Is Blue*, adapted from the Broadway play of the same name. The Kansas censors banned it, variously stating that its was a "sex theme throughout" and further that "the Board has found that film to be obscene, indecent and immoral and such as tend to debase or corrupt morals." The Supreme Court, in reversing, wrote nothing except a one-line opinion which said that the reversal was on the authority of the *Burstyn* and *Superior* cases. Where that leaves the law I frankly do not know. The best guess I can offer is that the Supreme Court upset the censorship ban in Kansas either because the Kansas censors seemed to be saying that they would ban any movie that concerned itself principally with sex or that the Supreme Court thought that the Kansas authorities were applying some too-vague concept that the picture might "tend to debase or corrupt morals."

What is "obscene"? What does "obscenity" reasonably mean in American law? The first recorded criminal conviction in the United States for the sale of an obscene book was that of Holmes³¹ in 1821, just thirty years after the Bill of Rights had become effective. Since then, there have been many such criminal prosecutions, especially in Massachusetts and New York, dealing with such diverse literary products as Glyn's *Three Weeks*, Dreiser's *American Tragedy*, Lawrence's *Lady Chatterly's Lover*, the *Arabian Nights*, the *Works* of Rabelais, *The Decameron*, *Tom Jones*, Joyce's *Ulysses*, and many another. It is safe to say that in every single one of these prosecutions there was involved in some fashion the famous Hicklin test for obscenity pronounced by Lord Chief Justice Cockburn, Court of Queen's Bench, in *Regina v. Hicklin*,³² a prosecution under the famous LORD CAMPBELL'S ACT OF 1857. The *Hicklin* decision came down in 1868, which by coincidence was the same year in which New York enacted its first criminal obscenity statute. Today, almost all the American states have obscenity laws. It is safe, too, to say that no judicial language ever uttered has been more thoroughly analyzed or more bitterly excoriated. The *Hicklin* test, formulated by the immediate successor to Lord Campbell in the Chief Justiceship, is: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The same idea is expressed in a Massachusetts statute³³ enacted in 1771 and still on the books, which makes it a crime to sell a writing "which is obscene, indecent or impure, or manifestly tends to corrupt the morals of youth." The NEW YORK PENAL LAW (section 1141) in effect for almost 70 years puts it more simply when it condemns "any obscene, lewd, lascivious, filthy, indecent or disgusting book."

³¹ 17 Mass. 336 (1821).

³² L.R. 3 Q.B. 359 (1868).

³³ ANNOTATED LAWS OF MASS., C. 272, §28, Vol. 9.

Objections to that test readily suggest themselves. Opponents of censorship say that the Hicklin formula permits a book to be condemned because of isolated passages regardless of its total purpose and effect; that it does not consider whether the subject work has attained an accepted place in literature or art; that if the subject is a new work, that the Hicklin test ignores the opinions of competent critics; that the effect of the book or picture should be measured not by its impact on one particular class but upon all whom it is likely to reach. The Hicklin theory of obscenity rigidly applied would, it is asserted, brand as obscene the Bible, Shakespeare and most of the great fiction classics of our language. It would, say its enemies, proscribe many a medical treatise and any book of sex education. A possible compromise with the rigidity of the Hicklin rule is found in the Federal Court opinion³⁴ dealing with *Ulysses* which says that the standard "must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merit it may have in that reader's hands; of this, the jury is the arbiter."

Not only do those who inveigh against the Hicklin rule brand it as stupid and unworkable but they point to many court decisions especially in New York to back up their assertion that the rule is no longer actually applied. I do not pretend to have analyzed the reported cases in all 48 states, but I do claim familiarity with those of New York, the state which is the center of the publishing business on all its levels, including, sadly, the very lowest levels of that trade. My considered opinion is that Hicklin is still the decisional law of New York but that there have been engrafted onto its simple framework some necessary, logical and moderating exceptions or explanations. Generally, those exceptions are: that the rule does not apply to works of thoroughly and long recognized literary merit, that a work is not necessarily obscene because it contains exotically stimulating passages so long as its general purpose, scheme and effect is not merely smut for smut's sake; and that the necessities of education and the progress of learning must except entirely from the rule's operation a large class of educational books, the exact content of that class not being measurable but to be determined in justice and reason, case by case. I confess that I see nothing absurd or benighted about leaving the law in such a state. No book has a brother, and it is, I think, beyond human ingenuity to devise a legal text for obscenity so precise that it can be laid alongside a book or picture for comparison with an automatic mathematical result made instantly available. The law does not claim to be an exact science. It is a set of behavioral rules applied by human judges to human acts. Even theologians differ.

In the standard collection of judicial definitions found in the work entitled "Words and Phrases" there are several pages of quotations

³⁴ 83 F.2d 158.

of judicial language attempting to explain and interpret the words obscene and obscenity. At first glance these definitions seem hopelessly prolix, contradictory and vague. Various courts have said that matter is obscene which has a "libidinous effect" or is the expression of "something which decency forbids to be expressed" or it is "shocking to public taste" or "filthy" or "offensive to fastidiousness or modesty" or "tends to corrupt the morals of youth." BLACK'S LAW DICTIONARY has an omnibus definition or set of definitions including "lewd, impure, indecent, repulsive, filthy, offensive to modesty or chastity, calculated to shock the moral sense of men by a disregard of chastity or modesty" etc. Actually, the word "obscene" seems to be one of those labels not uncommonly used in the law (like due process or fair trial or reasonable care). It defies technically complete and exact definition but expresses a generally recognized and implied concept that must be applied case by case reasonably and honestly. In *People v. Muller*,³⁵ decided in 1884, the New York Court of Appeals commented that the New York statute does not undertake to define obscene or indecent pictures or publications, but, said the court: "The words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning, and readily and in most cases accurately applies them to any object or thing brought to his attention which involves a judgment as to the quality indicated. It does not require an expert in art or literature to determine whether a picture is obscene or whether printed words are offensive to decency or good morals. These are matters which fall within the range of ordinary intelligence, and the jury does not require to be informed by an expert pronouncing on them." In other words, a decision as to whether something is so indecent as to merit prohibition is one of those judgments which every reasonable person makes for himself in the ordinary business of living. The Supreme Court, a few years after the *Muller* case, expressed much the same thought when it said this in an opinion by Justice Harlan, grandfather of the present Justice Harlan:

"Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious."³⁶

Fifty years later in the *Winters*³⁷ case the Supreme Court took the trouble to describe as apt words for a permissible statute those found in Section 1141, Penal Law: "obscene, lewd, lascivious, filthy, indecent or disgusting . . .". The rule and the test then is one of reason. It rejects as obscene such truly and intrinsically filthy material as repre-

³⁵ 96 N.Y. 408, 411 (1884).

³⁶ *Rosen v. U.S.*, 161 U.S. 29, 42 (1896).

³⁷ *Supra*, note 14 at p. 520.

sententious and descriptious of unnatural sex acts. It bans also, following *Hicklin*, publications which, read as a whole, have a tendency to deprave and corrupt the immature mind.

In seeking to work out a useful definition of obscenity it is instructive to turn to Canon Law. In so doing we discover first that the Canon Law, like our own modern American law, finds it impossible or unnecessary to set up a mechanical or strait-jacketing definition of obscenity. But the writings of the great Catholic authorities on moral theology abound with interpretations of the phrase "impure or obscene matters" which appears in the code of Canon Law. When we look at some of these Canon Law interpretations we are struck by their similarity to the *Hicklin* case test. For a book to be prohibited for obscenity, say the theologians, it is necessary that from the whole tenor thereof, the author's intentions seem to be to teach the reader about the sins of impurity and arouse him to libidinousness. It is the principal purpose of the author and the principal scope of the book that is sought for. Father Vermeersch, a great Jesuit writer on sex morality, says that an obscene nude is a nude that allures. Another Jesuit writer, Father Gerald Kelly, says that for literature or theatrical productions to be obscene two elements are required; first, that the theme or content is of an impure or sexually inviting nature, and second, that the manner of presentation is such as to throw an active emphasis on that impure or sexually exciting element. He says that a book or play about adultery is not necessarily obscene but when a book or play not only centers about adultery but portrays it in an attractive manner, then it must be called obscene. As Father Harold C. Gardiner, still another Jesuit, points out in a paper published last year in *LAW AND CONTEMPORARY PROBLEMS*, the emphasis in Canon Law is always on the tendency of the book or work of art to exude some sort of allure that panders to the passions of sex. Thus the elements are themselves objective and the intentions of the author or artist are expressed externally in the work itself. In this sense there are objective norms by which obscenity can be discovered. Father Gardiner, too, has noticed the marked correspondence between this test and that of the *Hicklin* case. The substance of the *Hicklin* test and that of the Catholic Canon Law experts' test is in the end the same, that is, as to whether the work under investigation depicts filthy sex matters or has a tendency to stimulate sexual passion. Father Gardiner sums up his discussion with the statement: "Any object which per se tends to rouse the sexual passions is obscene." The canonists offer us a warning which, if heeded, would help to dissipate some of the natural fear and distaste of Americans toward censorship. The canonists tell us that all restrictive legislation is to be interpreted at its minimum extent, that is, that human liberty is to be curtailed just as little as possible in the achievement of the ends of particular legislation.

Canon Law, like our modern civil law, admits its failure to give an absolutely certain and mechanically applicable definition. Every determination must be a matter of careful and prudent judgment.

In seeking a viable solution for the problem of censorship by law in a democratic society, we must eschew extremes and shun the extremists. We share the views neither of those who picture all censors as blue-nose kill-joy meddlers choking off artistic expression, nor of those who at the other extreme condemn all nudes as obscene and all mention of sex as sinful. We talk the language of law based on reason and justice. Gone is the old star chamber which "once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages."³⁸ No modern American judges I know have any intention of following the example of Chief Justice Scroggs who took it upon himself (and his Court of King's bench) to prohibit the publication of a periodical purporting to describe the doings of the Papacy. There is no danger at all that any censorship in this country would dare to enjoin the publication of anything remotely resembling a newspaper or periodical of information or opinion. Everyone recognizes that on a balancing of good and bad, interfering with a free press is a much worse evil than any that result from complete freedom of the press. We agree with Thomas Jefferson that as to the general content of newspapers, interference is the worst of all evils, since "our liberty depends upon the freedom of the press, and that cannot be limited without being lost." But obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries, a public evil, a public nuisance, a public pollution. When its effective control requires censorship, I see no reason why democratic government should not use democratic processes on a high administrative level, under the control of the courts, to suppress such obscenity.

³⁸ *Brandeth v. Lana*, 8 Paiges Chancery Reports 24 (N.Y., 1839).